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Attorneys for Plaintiff
McKESSON CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

McKESSON CORPORATION, a Delaware
corporation,

Plaintiff,

v.

FAMILYMEDS GROUP, INC.,
f/k/a Drugmax, Inc., a Connecticut corporation,

Defendant.

FAMILYMEDS GROUP, INC.,
f/k/a Drugmax, Inc., a Connecticut corporation,

Counterclaimant,

v.

McKESSON CORPORATION, a Delaware
corporation,

Counterdefendant.

FAMILYMEDS, INC.,
a Connecticut corporation,

Cross-Complainant,

v.

McKESSON CORPORATION, a Delaware
corporation,

Cross-Defendant.

Case No.4:07-cv-05715 WDB

**DECLARATION OF MARIA K. PUM
IN REPLY TO OPPOSITION OF
FAMILYMEDS TO MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION FILED BY
McKESSON CORPORATION**

Complaint Filed: November 9, 2007
Cross-Complaint Filed: December 17, 2007

Date: August 20, 2008
Time: 1:30 p.m.
Place: Ctrm 4
1301 Clay St., 3d Floor
Oakland, CA

1 I, MARIA K. PUM, declare that I have personal knowledge of the following facts and, if
2 called upon to do so, I could and would testify competently thereto:

3 1. I am a partner with the law firm of Henderson & Caverly LLP, counsel to
4 McKESSON CORPORATION (“McKesson”), the plaintiff in the instant action. In my capacity as
5 a partner at Henderson & Caverly LLP, I am one of the two partners responsible for the
6 representation of McKesson in this matter. I am also the partner with whom Mr. Matthew
7 Kenefick, one of the attorneys representing Familymeds Group, Inc. and Familymeds, Inc.
8 (together “Familymeds”) in this action, communicated with regard to alleged meet and confer
9 efforts relating to the instant action.

10 2. It appears based on the proofs of service attached to the discovery served upon our
11 firm as counsel for McKesson, that Familymeds served their “First Request for Production of
12 Documents and Things of Familymeds Group, Inc. f/k/a Drugmax, Inc., a Nevada Corporation”
13 (the “Document Request”) and their “First Set of Interrogatories of Familymeds Group, Inc. f/k/a
14 Drugmax, Inc., a Nevada Corporation” (the “Interrogatories”) upon McKesson on June 11, 2008—
15 some 37 days after the May 5, 2008 Order of this Court lifted the stay on discovery. It was also 37
16 days after FM Group knew that the Court had instructed McKesson to file a motion for summary
17 judgment by June 4, 2008.

18 3. The Document Request and the Interrogatories were served upon McKesson by
19 First Class mail and not in a manner calculated to arrive expeditiously at our offices.

20 4. McKesson timely responded to the Document Request and the Interrogatories on
21 July 14, 2008. Because of the breadth and over-burdensome scope of the Document Request and
22 the Interrogatories (collectively, the “FM Discovery”), and based on this Court’s comments at the
23 hearing on May 5, 2008 that discovery in anticipation of McKesson’s promised motion for
24 summary judgment should be limited to what was at issue in that motion, McKesson’s responses
25 sought to focus only on the unpaid invoices outstanding—which represented seven days’ of orders.

26 5. In a cover letter that accompanied our responses to the Document Request and the
27 Interrogatories, we advised counsel for Familymeds that we were still grappling with
28 correspondence that might be responsive to the Document Request. On July 17, 2008 I sent an

1 email to Mr. Kenefick advising him that the production of emails was even more burdensome than
2 I had a first believed and I asked that his client attempt to narrow down the email request by
3 providing us with a list of authors and recipients and inviting him to provide me with an alternative
4 approach if that was not acceptable to his client. A true and correct copy of my email of July 17,
5 2008 is attached hereto as Exhibit 1.

6 6. After a few exchanges of emails on the subject raised in my July 17, 2008 email,
7 Mr. Kenefick asked when my partner Kristen Caverly and I would be available for a meet and
8 confer conference. On Friday, July 18, 2008, I offered Monday, July 21, 2008 for a meet and
9 confer conference under Local Rule 37-1(a). Mr. Kenefick responded he and Mr. Gephardt would
10 not be prepared to meet and confer until Thursday or Friday of that week. I offered Thursday, July
11 24, 2008. On Wednesday, July 23, 2008, Mr. Kenefick cancelled the meet and confer conference
12 and stated that schedules were such that a meet and confer conference could not occur until after
13 August 1, 2008. A true and correct copy of the July 23, 2008 email and the earlier email exchange
14 and the underlying email string is attached hereto as Exhibit 2.

15 7. To date, Mr. Kenefick has not offered a date for a meet and confer conference
16 relating to a proposed email production or any other discovery matter.

17 8. On July 30, 2008, Familymeds filed and served its papers in opposition to the MSJ
18 (the "Opposition Papers"). Among the Opposition Papers was a purported "Separate Statement of
19 Disputed, Undisputed, and Additional Facts in Opposition to Motion for Summary Judgment or, in
20 the Alternative, Summary Adjudication by McKesson Corporation" prepared by Familymeds (the
21 "FM Group Facts").

22 9. Familymeds made no attempt to contact me or my partner, Kristen E. Caverly of
23 Henderson & Caverly LLP, counsel for McKesson, to discuss or otherwise meet or confer
24 regarding any proposed new statement of material undisputed facts, nor with respect to agreeing
25 upon a joint statement of material undisputed facts before filing the FM Group Facts. As was set
26 forth in the Declaration of Kristen E. Caverly filed in support of McKesson's pending motion for
27 summary judgment (the "Motion"), FM Group did not respond to requests for comments on the
28 proposed joint statement of undisputed facts we sought to file in support of the Motion either.

1 10. Mr. Kenefick mischaracterizes the course of communications with regard to the
2 request by Familymeds on June 30, 2008 for a 60-day continuance of the hearing on the motion for
3 summary judgment or, in the alternative, summary adjudication filed on behalf of McKesson on
4 June 4, 2008 (the "MSJ"). From the outset of those communications, we advised Mr. Kenefick that
5 the 60 days he requested was unreasonable and that McKesson would consider a continuance of a
6 week or two. These communications were memorialized in a letter I sent to Mr. Kenefick on July
7 1, 2008 by email, a true and correct copy of which is attached hereto as Exhibit 3. The letter of
8 July 1, 2008 attached hereto as Exhibit 3 accurately states the course of events as set forth therein.
9 Familymeds was not content with a 2-week extension and continued to press for a longer
10 extension. Ultimately, Mr. Kenefick accepted a continuance from August 6 to August 20, 2008.

11 I declare under penalty of perjury under the laws of the United States of America that the
12 foregoing is true and correct. Executed this 6th day of August, 2008.

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15 _____
16 MARIA K. PUM
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EXHIBIT 1

Maria Pum

From: Maria Pum
Sent: Thursday, July 17, 2008 2:43 PM
To: 'Kenefick, Matthew'
Cc: Kristen Caverly
Subject: Follow up on Document Production

Matt--

You presumably have gotten our document production by now. As you know from the CD that we sent you together with our objection and response, the CD and the contents thereof have been designated as confidential pursuant to the stipulation re the protective order that we are confident the court will sign as the court's order.

I indicated in my cover letter with our discovery objections and responses that we were still addressing the production of correspondence. Producing emails has proven to be incredibly burdensome. McKesson has many many servers and so emails are not kept in a single location. Furthermore, to do what you have asked we would need to check each employee's hard drive, desktop and/or laptop to scour them for emails that might be responsive to your document requests. McKesson has literally thousands of employees. It is not feasible or reasonable for McKesson to identify and download what may be thousands, if not hundreds' of thousands of emails and then to review them for responsiveness and privilege. As an alternative, we suggest that you give us the names of authors and recipients of emails within McKesson that you think are the most likely to have relevant email correspondence, and give us some suggested search terms. We will then consider whether, if we focus on those authors and recipients of emails--assuming the authors and recipients are not attorneys for McKesson--we can generate a further production of documents that is at a manageable level.

If you do not wish to provide us with names and search terms for us to consider, then we will stand on our burdensome and overbreadth objections. Or if you have another suggestion we will hear you out on that. In that regard, we presume that Familymeds already has all the communications between Familymeds and McKesson so we could start by eliminating those emails.

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8/2/2008

EXHIBIT 2

Maria Pum

From: Kenefick, Matthew [MSK@JMBM.com]
Sent: Wednesday, July 23, 2008 4:23 PM
To: Maria Pum
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

Maria-

We had hoped to have a list of senders, recipients, custodians, and search terms compiled to be able to meet and confer this week.

Unfortunately, our resources have been focused on preparing our Summary Judgment papers and therefore we will not be able to do so.

Additionally, our e-discovery consultant, a key participant in the meet and confer conference, will be on vacation during the week of July 28 through August 1st. Accordingly, we will need to schedule the conference for a date following his return. My calendar during the week of August 4-8 is currently changing, so I will have to get back with you on scheduling the conference.

Thank you,

-Matt

Matthew Kenefick for

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-----Original Message-----

From: Maria Pum [mailto:mpum@hcesq.com]

Sent: Tuesday, July 22, 2008 4:25 PM
To: Kenefick, Matthew
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

Thursday afternoon would be fine.

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-----Original Message-----

From: Kenefick, Matthew [mailto:MSK@JMBM.com]
Sent: Friday, July 18, 2008 8:58 PM
To: Maria Pum
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

Maria-
We have received your discovery responses.

Initially, we note that the discovery responses contain a large number of objections and that you have withheld documents on the basis of trade secret, even though we have a stipulated protective order on file. The most problematic issue appears to be that in producing spreadsheets which contain tens of thousands of line entries, it appears that you went through the extra effort of converting the electronic documentation from usable spreadsheets into .pdf files. We hope this is not the case, especially in light of the fact that you were aware of the fact that we intended to use this information to oppose the Motion for Summary Judgment and you would only agree to continue the hearing for two (2) weeks.

Accordingly, we will not be ready to meet and confer on Monday. We will need a couple of days to review the documentation, confer with our experts, and to discern whether the electronically stored information was produced in a reasonably usable form, as that term is contemplated by Federal Rule of Civil Procedure 34(b)(2)(E)(ii).

We hope to be ready to discuss these issues by next Thursday or Friday, July 24/25. Are you available either day?

Thank you again,
-Matt

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-----Original Message-----

From: Maria Pum [mailto:mpum@hcesq.com]
Sent: Friday, July 18, 2008 1:57 PM
To: Kenefick, Matthew
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

Kristen and I are available for the Rule 37-1(a) meet and confer conference late Monday afternoon. How about 3:30?

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-----Original Message-----

From: Kenefick, Matthew [mailto:MSK@JMBM.com]
Sent: Thursday, July 17, 2008 5:19 PM
To: Maria Pum
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

Maria-

We are requesting that you have a client representative participate in the meet and confer telephone conference to help discern what specific information is not reasonably accessible because of undue burden or cost, as well as to evaluate the burdens and costs of providing the discovery. It has been our prior experience that it is more efficient to have a client representative participate in such a call.

Unfortunately, as you are unwilling to have a client representative participate in such a conference, then what is your availability for a telephone discovery meet and confer conference, pursuant to Local Rule 37-1(a), to discuss these issues?

Thank you,
-Matt

Matthew Kenefick for
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-----Original Message-----

From: Maria Pum [mailto:mpum@hcesq.com]
Sent: Thursday, July 17, 2008 4:55 PM
To: Kenefick, Matthew
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

We are not willing to have such a conference. We offered to meet and confer with you regarding your overly-broad and burdensome discovery requests. It would seem to us that you would have some idea of who might have been involved in communications that you are after and so considering a list from your client of authors and recipients of emails seemed like a possible place to start discussions of how to manage and prune your initial discovery request. We also need to discuss your client's responsibility for the cost of whatever production we agree to undertake if our meet and confer efforts are successful.

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-----Original Message-----

From: Kenefick, Matthew [mailto:MSK@JMBM.com]
Sent: Thursday, July 17, 2008 2:59 PM
To: Maria Pum
Cc: Kristen Caverly; Gebhardt, Robert C.
Subject: RE: Follow up on Document Production

Maria-

We have not yet received the discovery responses.

To address the e-mail production issue, why don't we have a telephone conference in which a McKesson representative participates to discuss a reasonable solution. Would you be willing to have such a conference?

If so, then what is your availability?

Thank you,
-Matt

Matthew Kenefick for

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From: Maria Pum [mailto:mpum@hcesq.com]

Sent: Thursday, July 17, 2008 2:32 PM

To: Kenefick, Matthew

Cc: Kristen Caverly

Subject: Follow up on Document Production

Matt--

You presumably have gotten our document production by now. As you know from the CD that we sent you together with our objection and response, the CD and the contents thereof have been designated as confidential pursuant to the stipulation re the protective order that we are confident the court will sign as the court's order.

EXHIBIT 3

Henderson Caverly LLP

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July 1, 2008

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Matthew S. Kenefick
Jeffer Mangels Butler & Marmaro LLP
2 Embarcadero Center, 5th Floor
San Francisco, CA 94111-3824

Re: McKesson Corporation vs. Familymeds Group Inc.

Dear Matt:

We are in receipt of your letter dated June 30, 2008 addressed to me and my partner, Kristen Caverly. Your letter is inaccurate. You asked if we would agree to move the hearing date on the motion for summary judgment filed on behalf of McKesson Corporation ("McKesson") which is scheduled to be heard on August 6, 2008. We advised you that we would consider a week or two. You stated that you had in mind a 60-day extension so that you could consider the responses to discovery requests you propounded on behalf of Familymeds Group, Inc. ("Familymeds") on June 11, 2008. We responded that 60 days was not acceptable.

Your letter urges us to reconsider our rejection of your request for a 60-day continuance. We do not see the justification for doing so. Consider:

- Primarily at issue are two invoices aggregating some \$628,994.22 which have been outstanding since April 7, 2007;
- The complaint was filed on November 9, 2007;
- You have known since at least March 12, 2008 that McKesson was intending to file a motion for summary judgment because I announced that fact in open court during our Case Management Conference held on that date;
- On May 5, 2008 the court lifted the stay of discovery *and* gave McKesson a deadline of June 4, 2008 to file its motion for summary judgment;
- It was fortuitous for Familymeds that due to the Court's other commitments, the earliest that a hearing could take place on the motion for summary judgment was August 6, 2008; otherwise the motion for summary judgment might have been heard in mid-July, if not sooner depending on when the motion was filed;
- You could have propounded discovery before the March 12 hearing date, but certainly as soon as May 6, 2008, but you elected not to propound any discovery

July 1, 2008

Page 2

until June 11, 2008 and then *you chose to serve that discovery by First Class Mail* rather than by overnight courier or even email meaning that the response deadline is now July 14, 2008;

- Your discovery is not calculated to focus on the *seven invoices* that we explain in the motion for summary judgment are the only seven invoices that remain unpaid; instead you have propounded extremely broad interrogatories and document requests seeking every piece of conceivable data for every single item purchased by Familymeds under its contract with McKesson which by our calculations is some \$60,000,000 of product;
- You have yet to come forward with even one piece of evidence supporting your theory that any pricing errors occurred in the contractual relationship between the parties that went uncorrected; and
- You have yet to advise us if any of the facts we describe as being material undisputed facts in our motion for summary judgment are actually disputed by Familymeds even though we sent you our proposed statement of material undisputed facts at least a week before we had to file our motion for summary judgment giving us even more reason to believe there are no genuine disputes here.

In short, your request for a continuance seems little more than an additional stalling tactic on the part of Familymeds to avoid paying McKesson what is due to McKesson under a contract that explicitly requires Familymeds to make payment for the full amount invoiced to Familymeds without any offset or adjustment whatsoever. Your request for a 60-day extension is not well-taken. We would consider a week or two as we advised you again this morning when you asked us to participate in a conference call with Judge Brazil's law clerk. However, we are not willing to agree to a longer period.

Very truly yours,


Maria K. Pum